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In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, PETITIONER

v.

VIRGINIA ELECTRIC AND POWER COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

J. LEE RANKIN,
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PERRY W. MORTON,
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In the Supreme Court of the United States

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No. 757

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VIRGINIA ELECTRIC AND POWER COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

In its petition for a writ of certiorari in this case (Pet. 8, 12, 15), the United States invited the attention of this Court to the fact that a case entitled *Augusta Power Company* v. *United States* (and reverse title), involving a similar factual situation, was then pending before the United States Court of Appeals for the Fifth Circuit (C.A. 5, No. 18150). The opinion of that court, reversing and remanding that case, has now been received and is reprinted in an Appendix, *infra*.

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While the United States does not agree with all that is stated in the Fifth Circuit's opinion, we do invite attention to the fact that that court reverses the district court, which had followed the ruling of the instant case, and expressly disagrees with the holding of the Fourth Circuit in the instant case "that the compensation to be paid is not the value of the easement to its holder 'but the difference in the value of the land with and without the flowage easement, not considering its value for water power purposes'" (Appendix, *infra*).[1]

In addition to the express conflict between circuits, we submit that the opinion in the *Augusta Power Company* case illustrates the need for clarification by this Court of the law applicable to the frequently arising flowage easement situation. For example, compare the statement of the Fifth Circuit that the Power Company should receive substantial compensation "If Augusta Power Company had been successful * * * in securing approval of the Federal Power Commission" (Appendix, *infra*) with the discussion at page 8 of our petition in the present case and with this Court's statement in *United States* v. *Twin City Power Co.*, 350 U.S. 222, 228, that "What the Government can grant or withhold and exploit for its own

[1] For the convenience of the Court a copy of the unreported opinion in *United States* v. *Cooper*, referred to in footnote 3 of the *Augusta Power* opinion, is also set forth in the Appendix, *infra*.

benefit has a value that is peculiar to it and that no other user enjoys."

Respectfully submitted.

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Assistant Attorney General.
ROGER P. MARQUIS,
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APRIL 1960.

APPENDIX

In the United States Court of Appeals for the Fifth Circuit

No. 18150

AUGUSTA POWER COMPANY, APPELLANT-APPELLEE

v.

UNITED STATES OF AMERICA, APPELLEE-APPELLANT

(And Reverse Title)

Appeals from the United States District Court for the Southern District of Georgia

(April 11, 1960)

Before RIVES, *Chief Judge*, and CAMERON and WISDOM, *Circuit Judges*

RIVES, *Chief Judge:* In view of *United States* v. *Chandler-Dunbar Co.*, 1913, 229 U.S. 53, and *United States* v. *Twin City Power Co.*, 1956, 350 U.S. 222, forbidding an award against the United States in eminent domain proceedings for hydroelectric power value in an interstate navigable stream, the main problem is to discover the basis, if any, for an award to the Augusta Power Company for its flowage easements over fast lands adjacent to the Savannah River.

The United States filed and served on Augusta Power Company its petitions for condemnation and declarations of taking in four civil actions in the Southern District of Georgia, and also in certain actions in the Western District of South Carolina,

which are not involved in this appeal. In its answers to these petitions, Augusta Power Company alleged that the lands taken were part of its holdings of approximately 1,257 acres owned in fee and lying on both sides of the Savannah River and approximately 362 acres over which it had flowage easements in the Southern District of Georgia. All issues of just compensation were referred to commissioners under Rule 71A(h), Federal Rules of Civil Procedure. The amounts fixed by the Commission as compensation for the tracts over which Augusta Power Company held fee simple title were paid and accepted, leaving for consideration only the five tracts over which Augusta Power Company held flowage easements.[1]

The instruments upon which the flowage easement claims are based, executed in 1906, provided that the rights granted were "to overflow and back water upon any such portion of said tract of land and islands as they or their heirs or assigns may deem advisable in the erection of any dam or dams for the development of a waterpower on the Savannah River * * *." The Augusta Power Company conceded that "the only use of these flowage easements by anybody would be in connection with and based upon the development of a dam for water power purposes in the Savannah River."

The Commission found that the fee value of the land taken in 1947 was $40 per acre and that the fee value of the land taken in 1950 was $45 per acre. It went on to hold that 70% of the value of the land

[1] Summarized as follows:

Tract	*Acreage*	*Fee Owner*
E-404	41.70	Savannah River Electric Company
E-444	128.39	Savannah River Electric Company
E-443	88.59	Twin City Power Company
E-458	37.68	Roy Edmunds and Wayne Goolsby
E-442	101.69	Fannie Beck Reid

taken in 1947 and 75% of the value of the land taken in 1950 represented the value of the flowage easements. On this basis the Commission arrived at awards as follows:

Tract E–404: 41.7 acres at $40 an acre equals $1,668.00, 70% of which is $1,167.60.
Tract E–442: 101.69 acres at $45 an acre equals $4,576.05, 75% of which is $3,432.04.
Tract E–443: 88.59 acres at $45 an acre equals $3,986.55, 75% of which is $2,989.91.
Tract E–444: 128.39 acres at $45 an acre equals $5,777.55, 75% of which is $4,333.16.
Tract E–458: 37.68 acres at $45 an acre equals $1,695.60, 75% of which is $1,271.70.

Accordingly, the total award of the Commission to the Augusta Power Company was $13,194.41, with interest at 6% from the respective dates of taking. The district court affirmed the Commission's report in all respects.

Both parties have appealed, the United States asserting that no compensation whatsoever should have been allowed for the flowage easements, and Augusta Power Company asserting that the amounts fixed as compensation for the flowage easements are too low.

In an extensive opinion accompanying its order affirming the report of the Commission and again in an opinion overruling the motion of the United States for new trial, the district court held that the United States had constructive or actual notice of the flowage easements of Augusta Power Company, and, hence, that Augusta Power Company was not bound by prior judgments purporting to fix the value of the fee or the entire value in the lands taken in proceedings of which the Augusta Power Company had no notice. We agree with that holding. We agree also with that part of the opinions of the district court holding the easement deeds valid and enforceable as between the owners of the fee and Augusta Power Company.

The district court followed opinions of the Fourth Circuit in *United States* v. *2979.72 Acres of Land, etc.*, 1956, 235 F. 2d 327, on rehearing, 237 F. 2d 165, and in *United States* v. *Twin City Power Company*, 1957, 248 F. 2d 108,[2] in holding that the decision of the Supreme Court in the *Twin City* case, *supra*, does not preclude the payment of substantial compensation to the Augusta Power Company for its flowage easements. The district court thought it "quite clear that the government should pay a just compensation for the taking of these lands at a fair value for agricultural and forestry purposes"; and it approved the Commission's method of apportioning that value, viz: "The criterion for dividing the value of the land is 'the difference in the value of the land with and without the flowage easement'." We agree that Twin City does not preclude the payment of substantial compensation to the Augusta Power Company for its flowage easements, but we disagree as to the method of measuring that compensation.

The Government insists that "the Power Company neither had nor claimed anything but a right to flood the lands in connection with the erection of a dam or dams for the development of water power on the Savannah River—the very thing which the Supreme Court has held to be noncompensable as against the United States." The *Twin City* opinion, however, expressly "put aside such cases as *United States* v. *Kansas City Life Ins. Co.*, 339 U.S. 799, where assertion of the dominant servitude in the navigable river injured property beyond the bed of the stream" (350 U.S. at p. 225). In the case referred to, *United States* v. *Kansas City Ins. Co.*, it was held that "* * * the

[2] To which may now be added the opinion on a subsequent appeal in *United States* v. *2979.72 Acres of Land, etc.*, 1959, 270 F. 2d 707.

navigation servitude does not extend to land beyond the bed of the navigable river." Indeed, *Twin City* itself approves the test of *United States* v. *Appalachian Power Co.*, 1940, 311 U.S. 377, 427, "If the Government were now to build the dam, it would have to pay the fair value, judicially determined, for the fast land; nothing for the water power" (350 U.S. at p. 227). Very clearly, the United States is in error when it claims on page 18 of its brief that it "has a dominant servitude which it can exercise in its discretion and without compensation."

If Augusta Power Company had been successful in assembling the necessary lands,[3] and in securing approval of the Federal Power Commission,[4] and thereafter had actually exercised its easements by permanently flooding the lands, their value for agricultural and forestry purposes would have been destroyed. If, with that status, the United States had condemned the lands, the compensation due would be payable to Augusta Power Company. That compensation would not include the hydroelectric power value, but it would embrace Augusta Power's property right to destroy the value of the lands for agricultural and forestry purposes.

At the other extreme, if factors such as difficulty of assemblage of all necessary lands, the increasing economic advantage of steam plants over hydroelectric plants, the need for additional power in the particular area, etc., had made it certain that the flowage easements would never be exercised by the Augusta Power Company or its assigns, *excluding the United States*,[5]

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[3] Compare *United States* v. *Cooper*, 5 Cir. No. 17946, m/s, decided March 24, 1960, and cases cited.

[4] See 16 U.S.C.A. § 797(e), et seq.

[5] The United States must be excluded as a possible assignee in determining the value of the easement, because the value of

then such compensation as might be due would be payable to the owners of the fee title and nothing to the Augusta Power Company.

Between the two extremes just illustrated, the respective values of the fee and of the easement would fluctuate from time to time depending on the probability or improbability of actual exercise of the easement by the Augusta Power Company or its assigns. If all interested parties were before the Court, the *maximum* which the United States would be required to pay would be the value of the lands, not including their value for hydroelectric power purposes. That is, however, a *maximum*, and not necessarily the measure of what the United States would have to pay under any and all circumstances. As said by Mr. Justice Holmes, speaking for the court in *Boston Chamber of Commerce* v. *Boston*, 1910, 217 U.S. 189, 195:

> But the Constitution does not require a disregard of the mode of ownership—of the state of the title. It does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land. And the question is what has the owner lost, not what has the taker gained. We regard it as entirely plain that the petitioners were not entitled as matter of law to have the damages estimated as if the land was the sole property of one owner * * *

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the easement must not be enhanced by the special need which the Government has for it. The Government should not, in fairness, be required to pay a value created by itself. *United States* v. *Cors*, 1949, 337 U.S. 325, 333, 334; see also *United States* v. *Chandler-Dunbar Co.*, 1913, 229 U.S. 53, 76.

See also, *United States* v. *Chandler-Dunbar Co., supra,* 229 U.S. at p. 80.

The compensation to be paid is the value of the interest taken. *United States* v. *General Motors Corporation,* 1945, 323 U.S. 373, 379. The flowage easement doubtless lessens the value of the fee-owner's interest, but it does not necessarily follow that the amount of such decrease and the value of the flowage easement to its owner are identical. The Augusta Power Company is limited to the value of the legal rights which it possesses. As said by this Court in *Messer* v. *United States,* 5 Cir., 1946, 157 F. 2d 793, 795, n. 5:

> Where, as here, the Government settles with the owner of one interest, the question of compensation for all interest is irrelevant; only the question of just compensation for the interest taken concerns the Government. *United States* v. *Petty Motor Co.,* 1946, 327 U.S. 372, 374, 66 S. Ct. 372.

Thus, we agree with the Fourth Circuit that the *Twin City* case does not preclude the payment of substantial compensation for flowage easements over fast lands adjoining a navigable stream, but, with much deference, we disagree with its holding that the compensation to be paid is not the value of the easement to its holder "but the difference in the value of the land with and without the flowage easement, not considering its value for water power purposes." *United States* v. *2979.72 Acres of Land, etc.,* on rehearing,

1956, 237 F. 2d 165, 166.[6] It seems to us that the *maximum* compensation payable for the flowage easement under any conceivable circumstances is so much of the value of the lands for agricultural and forestry purposes and for any other uses, not including hydroelectric power value, as the easement owner has a right to destroy or depreciate. That *maximum* is more simply expressed in the criterion adopted by the Commission, i.e., "the difference in the value of the land with and without the flowage easement." Subject to that *maximum*, the actual *measure* of compensation payable for the flowage easement is the value of the easement to its owner. "The question is, What has the owner lost? not, What has the taker gained?" 1 Orgel on Valuation Under Eminent Domain, p. 352.

The United States insists that the Augusta Power Company failed to show any substantial value for its easements, while the Power Company asserts that the amounts fixed as compensation for the flowage easements are too low. Since an erroneous standard was used for valuing the flowage easements, and since much confusion and uncertainty existed as to what was the correct standard, we consider it "just under

[6] See, also, the holding on original hearing that "the government must make compensation on the basis of the difference in the value of the land with and without the easement taken * * *." *United States* v. *2979.72 Acres of Land, etc.*, 4 Cir., 1956, 235 F. 2d 327, 329. *United States* v. *Twin City Power Co.*, 4 Cir., 1957, 248 F. 2d 108, 113, 114; *United States* v. *2979.72 Acres of Land, etc.*, 1959, 270 F. 2d 707, 709.

the circumstances"[1] to reverse the judgment and remand the cause for further proceedings not inconsistent with this opinion, and it is so ordered.

Reversed and Remanded.

In the United States Court of Appeals for the Fifth Circuit

No. 17946

UNITED STATES OF AMERICA, APPELLANT

v.

SARAH JOYCE KING COOPER, ET AL., AS EXECUTRICES OF THE WILL OF M. A. COOPER, DECEASED, ET AL., APPELLEES

Appeal from the United States District Court for the Northern District of Georgia

(March 24, 1960)

Before RIVES, *Chief Judge,* and HUTCHESON and TUTTLE, *Circuit Judges*

TUTTLE, *Circuit Judge:* This is an appeal from a judgment based on a jury verdict in a land condemnation case. Although there are other questions raised, the principal contention made by the government is that the trial court erred in permitting the jury to pass on the value of appellees' lands as having potential value as a dam site. This argument has a triple base. First, the government argues the Etowah River is navigable, and the case is therefore ruled by *United States* v. *Twin City Power Co.,* 350 U.S. 222; second, it argues that if not navigable, the Etowah was tributary to a navigable river (which is undisputed) and

[1] 28 U.S.C.A. § 2106.

thus subject to the paramount right of the Federal Government's control under the Commerce Clause of the Constitution, and thus the case should be ruled by the principle of the *Twin City Power Co.* case; third, that there was no proof on which the jury could base a finding that the use of the property for a dam site was reasonably probable within the reasonably near future and that the issue should not have been submitted to the jury.

As is strongly recommended in cases in which there is a separable disputed element of damage which the trial court feels should be passed on by the jury, the parties stipulated that separate verdicts be submitted: (*a*) the value with a water power element included, and (*b*) the value without such water power element. The jury found that value should be included for the potential water power usage and rendered a verdict for $100,000, including that value; it returned a verdict for $57,500 if hydroelectric power value was not to be included.

In the view we take of the case it is not necessary for us to pass on the question whether the Etowah River was navigable. Nor is it necessary for us to determine whether the principle enunciated by the Supreme Court in the *Twin City Power Co.* case, *supra,* is to be expanded to cover non-navigable rivers and streams. This precise question appears to be before the Supreme Court in *United States* v. *Grand River Dam Authority,* * * * U.S. * * *, certiorari granted on December 19, 1959, to the Court of Claims in the case of *Grand River Dam Authority* v. *United States,* 175 F. Supp. 153.

We conclude that there was a complete failure of proof that there was a reasonable probability that this land would be used for a dam site within the rea-

sonably near future[1] by any one other than the Federal Government. The trial court clearly submitted to the jury, over appellant's objection, the question whether such a reasonable probability existed. The charge was:

> No consideration shall be given to nor allowance of just compensation made for any element of value depending on future events, circumstances or a combination of circumstances which, while within the realm of possibility, had not been shown by a preponderance of the evidence to be reasonably probable in the reasonably near future after the taking date.

This part of the charge is in part of the language of the Supreme Court in *Olson* v. *United States*, 292 U.S. 246. In the *Olson* case the court used this language in an opinion by which it affirmed the judgment of the lower court ruling out proffered testimony seeking to establish the fact of reasonable probability. The situation is different here, because the trial court not only permitted all the proffered testimony on behalf of appellees, but also ruled that it was sufficient to warrant a jury finding in their favor.[2]

The only testimony on this issue was given by Mr. B. M. Hall, Jr., a qualified hydroelectric engineer. We do not question either this witness's qualifications or his competence in arriving at the conclusion to which he testified when he gave the firm opinion that

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[1] Appellees frankly concede, as they must "that in order for this special adaptability to be considered, there must be a reasonable probability of the lands in question being combined with other tracts for this special or higher use in the reasonably near future. *Olson* v. *United States*, 292 U.S. 246, 255–256; *Continental Land Co.* v. *United States*, 88 F. 2d 104, 111, cert. denied, 302 U.S. 715."

[2] Both by a pretrial ruling, a continuing objection allowed by the court at the beginning of the trial, and by objection after the conclusion of the court's charge, appellant effectively raised the issue and preserved it for appeal.

this land *could* be used as the foundation for one end of a high dam (100 to 135 feet as testified to by him) for the creation of hydroelectric power on a commercially profitable basis.[3]

Having testified that there were no comparable sales of such fast lands on which to base an opinion of value, the witness stated that he arrived at his opinion touching on the value of this site by what he called the "steam comparison method." He was asked what in his opinion was the fair market value of the land in question as a potential dam site. His answer was, "not less than $200,000."

However, in addition to proof that the land offered a site on which it would be *practicable* to build a dam for the creation of hydroelectric power, it was incumbent on the plaintiffs to prove that there was also a *reasonable likelihood* that it *would* be so used in the *reasonably near future*. *Olson* v. *United States, supra,* p. 256; *United States, ex rel TVA* v. *Powelson,* 319 U.S. 266, 275. Any failure in this regard was clearly saved for review by the government both in its objection to the evidence and in its motion that the entire issue of water power value be excluded from the jury's consideration. There can be no doubt that the court's attention was called to the inadequate and speculative character of the testimony.

An expert witness may give his opinion based on assumptions stated by him. However, if the assumptions needed to support the opinion are not proved, or at least testified to, and are not otherwise taken to be true, the opinion is worthless. See *International Paper Co.* v. *United States, supra,* in which we stated: "Of course, opinion evidence may of itself be substan-

[3] We are here separating the issue of commercial practicability of using this land as a dam site from the other issue, i.e., the reasonable likelihood that it would be so used in the reasonably near future for this discussion.

tial enough to take a case to the jury. However, an opinion is no better than the hypothesis or the assumption upon which it is based." 227 F. 2d 201, 205. Here, moreover, it is plain that the witness Hall was not qualified as an expert on the issue of probability of use within the reasonably near future. He was qualified as a hydraulic engineer. As to matters touching on such problems he could testify if an adequate hypothesis was given. The question whether it was reasonably probable that the land would be used in the reasonably near future must be established to the jury's satisfaction. Hall's unsupported statement that "there was a good probability of using the Cooper lands in connection with other lands for the purpose of building a hydraulic dam there,"[4] did not supply

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[4] His entire opinion on this point was expressed in the following series of questions and answers:

"Q. Could the Cooper lands have been put to use for hydro-electric purposes in the reasonably near future from June 12, 1946?

"Mr. CLEMMONS. I object to that without showing it was reasonably probable that there would be a demand and that the value had been enhanced for this particular value.

"The COURT. That's a rather broad question. Conceivably any land of this nature could be used for hydro-electric power. I think an answer to that question would entail a great many factors, Mr. Maddox. If you lay the foundation for it, he can answer it.

"Mr. MADDOX. May I ask, could the Cooper land have been put to use for hydro-electric purposes in June of 1946?

"Mr. CLEMMONS. Same objection, your Honor.

"The COURT. Do you mean profitably put to those purposes?

"Mr. MADDOX. Yes, sir, I am going to ask him one step at a time.

"The COURT. I'm going to let him answer the question, but, of course, as Mr. Clemmons said, there would have to be at that time a sufficient probability of that use as to then have affected the market value, but I'll let him answer the question.

the lack of evidentiary facts on which the jury could make its own finding.

"By Mr. MADDOX:

"Q. Could it have been put to that use in June of 1946?

"A. Yes, in my opinion it could have.

"Q. Was it in fact put to that use within the next year or two?

"A. Yes, sir.

"Q. Could it have been foreseen on June 12, 1946 that it would reasonably be put to use for those purposes in the near future?

"Mr. CLEMMONS. I object to that unless he excludes governmen. l use.

"The COURT. I take your question to contemplate whether or not it could have been probably used, all the elements which he has covered, confining it to that. I will let him answer the question. That is, all the physical elements.

"Mr. MADDOX. Yes.

"The COURT. He can answer the question.

By Mr. MADDOX:

"Q. Would you answer it? Could it in June of 1946 have been reasonably foreseen then that it would be put to this use in the near future?

"A. Yes, sir.

"Q. On June 12, 1946, was there a possibility of using the Cooper lands in connection with other lands for the purpose of building a hydro-electric dam there?

"A. Yes, in my opinion there was a good probability.

"Q. On June 12, 1946, would it have been economically feasible for private business to have used the Cooper Dam Site in combination with other lands to build a hydro-electric power dam and plant located there?

"A. Yes, sir."

It will be noted that none of the questions, until the very last one, incorporated the idea of use for a dam site exclusively other than the government. The last question which alone related to its use "for private business" reverts to the economic feasibility of it and not to the reasonable likelihood that it will be so used.

Of course, it was perfectly clear in June 1946 that the lands could be used for hydroelectric purposes because the very dam for which they were subsequently taken had already been authorized by Congress.

Although the witness's testimony as to possible future use did not refer to future use by others than the United States government, and the United States Attorney sought to clarify this point by his objection (see footnote 4), nevertheless we can assume for the purpose of this discussion that the witness really intended to say more in that respect than he actually did say, for even on this assumption the absence of a factual basis for his opinion robbed it of any evidentiary value.

That this is so is plain when it is considered that there was evidence that the land necessary to construct the dam and reservoir involved more than 10,000 acres owned by many land owners, but there was no testimony as to how many tracts were involved; there was no evidence as to what roads, bridges, public utilities, municipal facilities and the like would be flooded, and as to which rights must therefore be secured if a high dam was to be built, and so, too, there was no evidence, not even an estimate, as to how much it would cost to assemble all the property rights needed; moreover, it was not suggested that all the property could be acquired by private negotiation at any price, much less at a commercially feasible one, without the necessity of resorting to the power of eminent domain. Certainly, there was nothing before the jury that would permit it to find that the lands would be likely to be assembled without use of eminent domain. The Supreme Court, of course, has held in *United States, ex rel TVA* v. *Powelson*, *supra*, that if the acquisition or assembling of property for development of a dam site requires the use of the state's power of eminent domain the likelihood of such use for the land cannot be considered in federal condemnation proceedings. To the same effect see *McGovern* v. *New York*, 229 U.S. 363, 372.

In the absence of any evidence as to all of these matters there was no basis on which the jury could determine the issue presented to it when the trial court charged it, (see above) "no consideration shall be given to nor allowance of just compensation made for any element of value depending on future evidence, circumstances or a combination of circumstances which, while within the realm of possibility, *had not been shown by a preponderance of the evidence* to be reasonably probable in the reasonably near future after the taking date." Here there was no evidence that the use of the property for a dam site was anything more than a mere "possibility." The unsupported opinion of the hydraulic engineering expert that there was "a good probability" of using these lands in connection with others for the purpose cannot supply the basis for such a finding by the jury. For the proposition that an opinion of an expert witness not based on adequate factual foundation is without probative value, see our recent case of *Nashville Bridge Co.* v. *Ritch*, 5 Cir., —— F. 2d ——, decided February —, 1960.

It is not to be taken from what we have said above touching on the use by a private party of the power of eminent domain that we are here stating that the availability of the power of eminent domain in the assembling of lands for public works may not have its effect on giving value to such properties. The availabiilty of the power of eminent domain to assist either a public utilities corporation or an individual to acquire properties for power purposes, may, and undoubtedly sometimes does, create speculative values in such lands, actually resulting in the purchase and sale of such properties on the market. Where a market value is created by such activity, the owner is entitled to be paid at such market value even though it

has been enhanced by the public's acceptance of the possibility that the power of eminent domain may make possible the building of a power facility. This is well explained in *Olson* v. *United States, supra,* where on page 256 the Court says:

> * * * It is common knowledge that public service corporations and others having that power frequently are actual or potential competitors, not only for tracts held in single ownership but also for rights of way, locations, sites and other areas requiring the union of numerous parcels held by different owners. And, to the extent that probable demand by prospective purchasers or condemnors affects market value, it is to be taken into account.

Here this element of eminent domain does not arise because the valuation expert testified that he knew of no sales of comparable properties. The parties seem to agree that there had been none for a period of many years anywhere in the state of Georgia.

The cases of *Olson* v. *United States, supra; McGovern* v. *New York, supra,* and *United States, ex rel TVA* v. *Powelson, supra,* are cases in which the Supreme Court held evidence proffered to prove the existence of a reasonable likelihood of a special use in the reasonably near future was insufficient *even to be submitted to the fact finding tribunal. McCandless* v. *United States,* 298 U.S. 342, is a case in which the court held proffered testimony as to probable future use was of sufficient probative value to warrant its being considered by the trial court. The record here discloses that the evidence actually submitted fails to provide more than a basis for speculation by the jury, a thing which the Supreme Court in the Olson case said was "to be condemned in business transactions as well as in judicial ascertainment of truth."

The government also vigorously attacks evidence of a further special use, that is, use of these lands as a site for "washer ponds," a sort of artificial pond to be used in connection with surface mining. It is true that the witness initially indicated that he arrived at a value of the lands by computing the total estimated income that under this hypothesis would have been received from them in the mining process, even though such receipts would extend over a period of some ten or more years. We conclude that, however unrealistic his opinion might be if based on the assumption that the estimated figure of $153,750 payable over ten years would of itself give them a value at the time of taking of $153,750, the opinion was not solely based on such an assumption. The opinion was admissible and its weight was for the jury to assess. It is clear that the jury heavily discounted the testimony of valuation assigned to the lands as washer pond sites.

The government also contends that the trial court erred in sustaining an objection to proffered testimony by a government witness when he was asked whether in his opinion the Federal Power Commission would grant a license to build a private dam on the site in question after congressional action had been taken assuming paramount jurisdiction over the entire river system. It was, of course, a matter of great significance in any valuation of the lands in question as a potential power site that the Federal Power Commission had the undoubted power to refuse the grant of a license. Even so, we think the trial court correctly ruled that a witness could not properly attempt to testify as to his opinion on what action a federal agency might or might not take in the premises. This was a matter open to cross examination of appellees' witnesses in order

to test out the degree of importance attributed by them to this possibility. It was also a matter for argument to the jury, if the issue had otherwise been properly submitted to the jury.

We conclude that the alternative verdict of $57,500 for the value of the property, without giving effect to its potentialities as a power site must be accepted and that the verdict which included compensation for the power increment must be set aside.

The judgment is REVERSED and the case REMANDED for further proceedings not inconsistent with this opinion.

U. S. GOVERNMENT PRINTING OFFICE: 1960